2-5-1976

Esther Miller, et al v. Covington Development Authority, et al

Amicus Brief 1975-SC-1114

AMICUS BRIEF

SUPREME COURT OF KENTUCKY

File Nos. 75-1114 and 75-1116

ESTHER MILLER, Et Al., - - - Appellants,

versus

COVINGTON DEVELOPMENT AUTHORITY, Et Al., - - - - - - - - - Appellees.

APPEAL FROM KENTON CIRCUIT COURT
FOURTH DIVISION
THE HONORABLE JAMES J. GILLIECE, JUDGE

BRIEF FOR CITIES OF PADUCAH AND BOWLING GREEN, AMICI CURIAE

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This is to certify that a true copy of this Brief has been mailed to the following parties of record in accordance with RCA 1.250, this 5th day of February, 1976: Hon. Jo M Ferguson, Grafton, Ferguson, Fleischer & Harper, 310 Liberty Street, Louisville, Kentucky 40202; Hon. Donald C. Wintersheimer, City Solicitor, City-County Building, Covington, Kentucky 41011; Hon. A. Wallace Grafton, Jr. and Hon. S. G. Snyder, Wyatt, Grafton & Sloss, 2800 Citizens Plaza, Louisville, Kentucky 40202; Hon. R. Barry Wehrman, Wehrman and Wehrman, 301 Pike Street, Covington, Kentucky 41011; Hon. George Rabe, City Solicitor, City Building, Lexington, Kentucky 40507; Hon. Samuel Milner and Hon. Amos Eblen, Eblen, Howard & Milner, 310 Lexington Building, Lexington, Kentucky 40507; and Hon. James J. Gilliece, Judge, Kenton Circuit Court, Covington, Kentucky 41011.

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TABLE OF CONTENTS AND AUTHORITIES

PAGE

Statement of the Case for Amici Curiae 1–4

Argument 4–9

City of Bowling Green v. Kirby, 220 Ky. 839, 295 S. W. 1004 (1927) 5

State Budget Commission v. Lebus, 244 Ky. 700, 51 S. W. 2d 965, at 969 (1932) 5

Turnpike Authority of Kentucky v. Wall, Ky., 336 S. W. 2d 551, at 557 (1960) 6, 7

Grimm v. Moloney, Ky., 358 S. W. 2d 496, at 500 (1962) 7

Conclusion 9

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May it please the Court:

STATEMENT OF THE CASE FOR AMICI CURIAE

The City of Paducah and the City of Bowling Green are grateful for the permission granted them by the Court to be heard as *amici curiae.* Both Cities consider that the outcome of this case could have an important effect upon their future plans to attract private capital to the reconstruction of certain areas within their boundaries, particularly within the downtown sections.

Both Cities are acutely aware of the changed approach to what has been known as "urban renewal" which is resulting from the withdrawal of lavish federal grants for programs encouraged by the federal government and often adopted by the cities with more of an idea of capturing federal money than of rehabilitating areas in need of rehabilitation. Whatever may have been the values or the failures of the former programs, the cities are nevertheless aware of the continuing necessity for programs which will result in the reasonable rehabilitation of certain areas.

The Court is undoubtedly aware, without being told, of the desperate plight of center city areas in nearly every city of any size. The three cities which took the initial interest in making use of this statute are certainly prime examples of urban decay at the core of the urban area. In saying so, it is not the intent of Paducah and Bowling Green to criticize their sister cities; it is their intent merely to acknowledge a factual situation which exists in those cities and which may soon apply to Paducah and Bowling Green and other cities in Kentucky to an equal degree.

Paducah and Bowling Green, therefore, have given some attention to the possibility that Chapters 131 and 132 of the 1974 Acts may afford them a procedure for meeting their problems, particularly in their downtown areas. This procedure may be the only one left which, in fact, is available to them. The holding company method of financing projects, which has been so long used in Kentucky, has its own limitations, and usually results in a considerable drain on the general revenues

of any city because of the necessity, in most cases, to pay the yearly rentals out of general revenues. The general obligation bond route is seldom available in a practical way, particularly because of inflexible constitutional provisions as to date of approval by the voters and percentage of assessment limitations. The requirement of a two-third's vote is also a limitation which gives an undue influence to the always existing negative minority which would vote against the Second Coming if it were placed upon the ballot.

This is not to say that all who vote negatively on general obligation bond issues are wrong. A citizen may reasonably refuse to vote to bind himself and his fellow citizens absolutely to the payment of an obligation which he believes should be required to "stand on its own" and pay for itself. This is the very principle of tax increment financing which seems attractive to us. If tax increment financing is permitted in Kentucky, there can be no loss of general tax revenues. Every city can be assured that the costs of the public portions of any project undertaken and financed under Chapters 131 and 132 will be paid from new tax income generated by the private investments made in the area as a part of the total project. The statutes completely deny any right to obligate existing or future general revenues which would be received if the project were not undertaken, and require payment of bond obligations solely from new money derived from the total project. If anyone has made a mistake, and the project turns out to be a failure, the bondholders lose, but not the taxpayers.

Certainly the City of Paducah and the City of Bowling Green are too responsible to deliberately enter into any project which will not be successful, but each city must acknowledge that in using tax increment financing it can appreciate the degree of security arising from the assurance that, in entering into a project, it cannot really lose. This legislation imposes upon the bondholders the necessity for examining the feasibility of the project and for investing their money only after making their own judgment of value.

Consequently, there can be no doubt of the desirability of using this type of financing. We also conclude, after studying the cases, that there can be no doubt of the constitutionality of this method of financing if the Court logically follows the pattern of reasoning which it has developed over a long period of years.

ARGUMENT

It is not the desire of the Cities of Paducah and Bowling Green, as *amici curiae,* to attempt to substitute themselves for any other parties involved in the case and assume the duty of arguing all of the points which have been raised. Most points have been adequately briefed, and it is our purpose to discuss only the point which we consider the most important, and that is whether or not a contract of release entered into by a taxing authority with a development authority creates an unconstitutional indebtedness. We think that it does not.

The highest court of Kentucky has labored for 50 years, with the assistance of able constitutional lawyers, to define the limitations on permissible indebtedness which must guide the state and its agencies in the financing of public projects. We think the Court has strictly adhered to the clear policy laid down at the constitutional convention against the contraction of any obligation by a governmental unit which is absolutely payable by that unit from its general revenues, unless with the consent of an overwhelming majority of the voters subject to that unit of government. On the other hand, the Court has permitted governmental units to function in the twentieth century by developing the "special fund" doctrine which obligates the unit to pay only from "self-generated funds"—that is, funds produced by the project itself (see *City of Bowling Green* v. *Kirby,* 220 Ky. 839, 295 S. W. 1004 (1927)).

The uninitiated have often referred to decisions of the Court under the special fund doctrine as opinions which sought to "get around" the limitations in the Constitution. We don't think that this is so, and we don't think that the Court has sought to avoid the real limitations contained in the Constitution. The Court is denying to units of government only powers specifically denied to those units by our Constitution, no more. After all, our state Constitution is a limitation on powers, not a grant of powers. This construction, as it relates to "debts," is discussed in *State Budget Commission* v. *Lebus,* 244 Ky. 700, 51 S. W. 2d 965, at 969 (1932).

On this point we have no new case to cite, but upon reviewing other briefs filed in this appeal we are convinced that the full implications of one case have not been thoroughly explored. This case is *Turnpike Authority of Kentucky* v. *Wall,* Ky., 336 S. W. 2d 551 (1960), in which the Court of Appeals approved a statute which permitted the segregation into a special fund of estimated receipts derived from taxes on gasoline used by automobiles traveling on each particular turnpike project.

We are not so much attracted by the fact of the segregation of these funds as we are by the reasoning of the Court which upheld the segregation. The Court quoted, at page 557 of the cited case, a paragraph from American Jurisprudence which stated that it had generally been held that an obligation payable from excise taxes is not a debt within the meaning of constitutional debt limitations. But our Court stated:

> "We are not inclined to accept at face value the proposition that an excise tax can be pledged to the payment of bonds issued to finance an unrelated project without creating a 'debt'."

It is clear, therefore, that our Court did not accept what American Jurisprudence called the "general holding." Notwithstanding this refusal, however, the Court went ahead and upheld the segregation. Let us ask ourselves, very sharply, "Why?" When we have the answer to that question, we have the answer to the case at bar.

The answer lies in the relationship between the project and the tax. In Kentucky, it is not the nature of the tax which is controlling, but the nature of the relationship between the project and the tax. In *Turnpike Authority* v. *Wall,* therefore, the Court upheld the segregation of the tax into a special fund not because the tax was an excise tax, but because the tax receipts were generated by the project and would not have existed but for the project.

In *Grimm* v. *Moloney,* Ky., 358 S. W. 2d 496, at 500 (1962), the Court itself told us what it had done in *Turnpike Authority* v. *Wall,* saying:

> "We held that identifiable taxes were so directly related to the facility that they could logically be treated as revenue of the project, and, accordingly, pledged to the payment of the bonds, subject, of course, to possible prior application to the satisfaction of previously issued general obligation road bonds."

In following this principle the Court was able to uphold Chapter 178, 1962 Acts of the General Assembly (KRS 82.105 to 82.180, inclusive), which contained the following description of its tax pledge, which the Court quoted:

> "If the governing body of the city shall make a legislative finding of fact, as recited in the body of the ordinance authorizing issuance of the bonds, that the governmental project is of such nature as to provide increased revenues to the city by reason of increased employment and resulting increased receipts from occupational license fees or occupational license taxes, then the city may pledge and covenant that it will cause to be deposited in said

> separate and special fund the receipts which may be definitely identified as accruing from such occupational license fees or taxes by reason of employment in or directly related to the governmental project, less a proportionate part of the costs of collecting such fees or taxes."

This is the exact situation in the case at bar and this is the real reason why the Tax Increment Act does not violate constitutional prohibitions against indebtedness. Nothing is subtracted from the general revenues—all of the pledged fund is generated by the project itself.

Combine this "self-generating principle" with a voluntary release, as we have in the case at bar, and no one can properly maintain that in upholding the Tax Increment Act the Court is violating any provision of the Constitution which prevents the pledging of general revenues. A release, voluntarily given by a taxing authority, of an "expectation" which has no substance unless the release is given and the project undertaken, can surely be no more destructive of the rights of the taxing authority than an agreement with a sheriff to pay him the actual costs of collection of taxes. In this case the percentage paid may be larger but the possibility of gain by the taxing authority is greater because whatever it receives will be an addition to its otherwise expected revenues. The fact that the governing board of the taxing authority is ultimately responsible for making the decision on the amount of the release, or upon the question of entering into any release at all, should be the determinant in this case. That governing board has the duty to weigh all bene-

fits to be derived by it from the proposed project. It should be permitted to make the decision on its contribution in payment for those benefits.

CONCLUSION

The Court can have no doubt of the importance attached to this legislation by the cities which are affected by it. If there were any doubt, the Court need only to look to several proposals in the current session of the legislature to expand the Act to include other classes of cities. This is an important method of financing which is being adopted in more and more states, and we see no constitutional reason for denying this method to local governments in Kentucky. We believe that in upholding this legislation the Court will be following the pattern which it has established through the years under which it has protected governmental units from pledges of general revenues, while at the same time permitting the acquisition of capital projects which pay for themselves over a period of years.

Respectfully submitted,

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